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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 26 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2008-0030
Appellee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MELISSA MARIE ARRINGTON,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064627

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
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B R A M M E R, Judge.

¶1 Appellant, Melissa Arrington, appeals her sentences for negligent homicide, aggravated driving under the influence of an intoxicant (DUI) while her license was suspended, and aggravated driving with an alcohol concentration of .08 or higher while her license was suspended. She contends the trial court erred in imposing an enhanced sentence for negligent homicide because, she claims, the crime was not a dangerous-nature offense. She also asserts the trial court's imposition of consecutive sentences violated her constitutional rights against double jeopardy and her statutory right against double punishment. Last, she argues the court abused its sentencing discretion in failing to consider mitigating factors and in considering irrelevant facts in sentencing her.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Arrington's convictions and sentences. *See State v. Hamblin*, 217 Ariz. 481, ¶ 2, 176 P.3d 49, 50 (App. 2008). On the evening of December 1, 2006, E. was traveling south on Old Spanish Trail, riding his bicycle in the bicycle lane. E. had a rear light on his bicycle and was wearing reflective clothing and a helmet. Arrington was driving south on Old Spanish Trail after drinking at a bar earlier that evening. A friend driving behind Arrington's truck noticed she repeatedly "veered" out of her lane, across the bicycle lane, and onto the dirt shoulder of the road. At one point while driving, Arrington took her eyes off the road to use hand sanitizer stored in the front console of her vehicle. The truck again left its lane, crossing the bicycle lane and entering the dirt shoulder of the road. As Arrington steered

back onto the pavement, the front left corner of her truck hit E. from behind, projecting him onto the truck's windshield and then into the bed of the truck. E. died at the scene of severe, blunt-force trauma. Shortly after the accident, an investigating officer noted Arrington smelled of alcohol and had red, watery eyes. She also performed poorly on field sobriety tests. Blood tests taken after the accident showed she had an alcohol concentration of approximately .164 within two hours of the accident.

¶3 A grand jury charged Arrington with manslaughter, aggravated driving under the influence of an intoxicant while her license was suspended, and aggravated driving with an alcohol concentration of .08 or more while her license was suspended. After a six-day trial, the jury found her guilty of both aggravated DUI offenses. It also found her guilty of negligent homicide, which was offered to the jury as a lesser included offense of manslaughter. For purposes of sentence enhancement, the jury found the negligent homicide to be a dangerous-nature offense.

¶4 Citing as aggravating factors the jury's finding "of homicide committed with a BAC of over .15" and "the severe level of emotional harm to the victim's family," the trial court sentenced Arrington to an aggravated, eight-year prison term for negligent homicide. It also imposed a presumptive 2.5-year prison term for each DUI, to be served concurrently with each other but consecutively to the sentence for negligent homicide. This appeal followed.

Discussion

Dangerous-nature offense

¶5 The state alleged the manslaughter charge was a dangerous offense due to Arrington’s use of a dangerous instrument—her truck. *See* A.R.S. § 13-604(F). After finding her guilty of the lesser included offense of negligent homicide, the jury found the offense was of a dangerous nature “involving the use of a dangerous instrument during the commission of the offense,” and the trial court sentenced her accordingly. Arrington contends that, as a matter of law, “the use of a motor vehicle during the commission of negligent homicide” does not make the homicide a dangerous-nature offense.¹

¶6 Section 13-604(F) provides for the imposition of an enhanced sentence for certain felonies “involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” A “[d]angerous instrument” is “anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.” A.R.S. § 13-105(11). Arrington does not dispute that a motor vehicle may be a dangerous instrument, *see State v. Orduno*, 159 Ariz. 564, 566, 769 P.2d 1010, 1012

¹Arrington admits she did not object below to the dangerous-nature interrogatory in the form of verdict or present this argument to the trial court in any other fashion. Accordingly, she has forfeited this objection on appeal absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). As we explain, Arrington has not shown error, much less fundamental error. *See id.* ¶ 23 (“To obtain relief under the fundamental error standard of review, [appellant] must first prove error.”).

(1989), but argues we should interpret § 13-604(F) to require the knowing or intentional—as opposed to the negligent or reckless—use of a motor vehicle as a dangerous instrument in order to support sentence enhancement.

¶7 Arrington recognizes that Division One of this court has repeatedly rejected that interpretation but asserts those cases are wrongly decided. *See, e.g., State v. Garcia*, 165 Ariz. 547, 552-53, 799 P.2d 888, 893-94 (App. 1990); *State v. Venegas*, 137 Ariz. 171, 175, 669 P.2d 604, 608 (App. 1983). “Absent a decision by the Arizona Supreme Court compelling a contrary result, a decision by one division of the Court of Appeals is persuasive with the other division.” *Scappaticci v. Sw. Sav. & Loan Ass’n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983). We will depart from our prior decisions only if they were “‘based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.’” *Id.*, quoting *Castillo v. Indus. Comm’n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974). And in analogous circumstances—child abuse by criminal negligence—we agreed with Division One that the use of a dangerous instrument need not be intentional or knowing under § 13-604(F). *State v. Tamplin*, 146 Ariz. 377, 378, 380, 706 P.2d 389, 390, 392 (App. 1985).

¶8 We review questions of statutory construction de novo. *See McHale v. McHale*, 210 Ariz. 194, ¶ 7, 109 P.3d 89, 91 (App. 2005). “When construing a statute, our goal ‘is to fulfill the intent of the legislature that wrote it.’” *City of Sierra Vista v. Dir., Ariz. Dep’t of Env’tl. Quality*, 195 Ariz. 377, ¶ 10, 988 P.2d 162, 165 (App. 1999), quoting *State*

v. Williams, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). “If the statute is clear and unambiguous, we apply the plain meaning of the statute.” *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 7, 122 P.3d 6, 10 (App. 2005). “We look . . . to the statute’s language . . . [as] ‘the best and most reliable index of [the] statute’s meaning.’” *Williams*, 175 Ariz. at 100, 854 P.2d at 133, *quoting Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). We apply unambiguous statutes without resorting to other methods of statutory construction unless application of their plain meaning “would lead to impossible or absurd results.” *Bilke v. State*, 206 Ariz. 462, ¶ 11, 80 P.3d 269, 271 (2003).

¶9 As we have stated, Division One of this court has previously held the negligent use of a motor vehicle warrants sentence enhancement pursuant to § 13-604(F). In *Venegas*, the court rejected the appellant’s argument that the definition of “dangerous nature of the felony” in § 13-604(K)—now § 13-604(P)—“include[d] an intent requirement.” 137 Ariz. at 175, 669 P.2d at 608. At that time, § 13-604(K) stated, “For the purposes of this subsection, ‘dangerous nature of the felony’ means a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another.” 1982 Ariz. Sess. Laws, ch. 322, § 1. Subsection (F) provided for sentence enhancement for class four, five, or six felonies “involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument.” *Id.*

¶10 Without addressing the variation in language between subsections (F) and (K) or specifically analyzing the language of subsection (F), the court in *Venegas* concluded the dangerous-instrument ground for enhancement did not require a showing of intent to use an automobile as a deadly weapon. 137 Ariz. at 175, 669 P.2d at 608. That the court in *Venegas* did not fully explain its reasoning does not mean its conclusion was incorrect.

¶11 The language of § 13-604(F) can only reasonably be interpreted as providing that the use of a dangerous instrument need not be knowing or intentional to justify sentence enhancement. The pertinent language of the subsection is composed of two phrases stated in the disjunctive. The parallel construction of those disjunctive phrases—“the intentional or knowing infliction of serious physical injury” and “the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument”—each begin with the article “the.” § 13-604(F). Had the legislature meant for “intentional or knowing” to modify both phrases, it would have eliminated the second article so the subsection would instead apply to “the intentional or knowing infliction of serious physical injury or discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument.”

¶12 Division One reached the same conclusion in addressing identical language appearing in A.R.S. § 13-702(G). *See State v. Garcia*, 219 Ariz. 104, ¶¶ 8-13, 193 P.3d 798, 800-801 (App. 2008). That statute permits a trial court to designate class six felony offenses as class one misdemeanors when the court “is of the opinion that it would be unduly harsh to sentence the defendant for a felony.” § 13-702(G). However, a court may only do so for

felonies “not involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” *Id.* In *Garcia*, the defendant was convicted of disorderly conduct for recklessly displaying a firearm. 219 Ariz. 104, ¶ 3, 798 P.2d at 799. Relying on § 13-702(G), the trial court redesignated his class six felony offense as a misdemeanor. *Id.* ¶ 5. In reversing, Division One concluded that the disjunctive “or” separated the two phrases and that the article “the” introduced two distinct categories of offenses—those involving serious physical injury and those involving a dangerous weapon or instrument—with the intentional or knowing requirement modifying only the first phrase. *Id.* ¶ 10. Moreover, the court noted the use of the second article “render[ed the defendant’s] preferred interpretation very unlikely,” *id.* ¶ 11, and the “legislature could easily have used language that would clearly have required” the intentional use of a deadly weapon or dangerous instrument. *Id.* ¶ 12. Thus, the court concluded the defendant’s use of a firearm, reckless or otherwise, rendered § 13-702(G) inapplicable. *Id.* ¶¶ 13, 16. The court’s reasoning in *Garcia* applies equally to § 13-604(F).

¶13 Of course, we may look beyond a literal reading of a statute’s unambiguous language if there is “a clearly expressed legislative intent to the contrary.” *Mail Boxes, Etc., U.S.A. v. Indus. Comm’n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). Arrington argues legislative revisions to § 13-604(F) indicate an intention that the phrase “intentional or knowing” should modify both “serious physical injury” and the “use . . . of a deadly weapon or dangerous instrument.” *See Lake Havasu City v. Mohave County*, 138 Ariz. 552, 558,

675 P.2d 1371, 1377 (App. 1983) (“[W]hen the legislature amends a statute we must presume they intended to change existing law rather than perform a futile act.”).

¶14 As enacted in 1977, § 13-604(F), then numbered § 13-704(F), provided for enhancement “upon . . . conviction of a class 4, 5 or 6 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 4, 5 or 6 felony when the intentional, knowing or reckless infliction of serious physical injury upon another has occurred.” 1977 Ariz. Sess. Laws, ch. 142, § 48. Subsection (G), addressing class two or three felonies, contained the same language. The following year, the legislature renumbered § 13-704 to § 13-604 and amended the relevant portion of subsection (F) to apply to class four, five, or six felonies “involving the intentional or knowing infliction of serious physical injury or the use or exhibition of deadly weapon or dangerous instrument.” 1978 Ariz. Sess. Laws, ch. 201, §§ 98, 101. The legislature, however, left the relevant language of subsection (G) largely unchanged, removing only the word “reckless.” *Id.*

¶15 Arrington argues subsection (F) should be read to require the intentional or knowing use of a dangerous instrument because, unlike subsection (G), the language was changed so that both phrases follow the words “intentional or knowing.” She reasons that a different interpretation of the two subsections is sensible because both class two and three felonies “involve conduct that is inherently more dangerous, and typically require a state of mind which is more culpable” than that required for class four, five, or six felonies.

¶16 But, when both the old and new language can only reasonably be interpreted to have the same meaning, an otherwise unexplained change in a statute’s language is simply not “clearly expressed legislative intent” contradicting the language’s literal meaning. *Mail Boxes, Etc., U.S.A.*, 181 Ariz. at 121, 888 P.2d at 779. Moreover, viewed in light of our entire criminal code, the 1978 change to § 13-604(F) does not suggest we should interpret the two phrases differently. *See State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) (“[A] statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent.”). Phrasing like that in subsection (G) is also used in other sections of § 13-604 as well as in other statutes applying to all classes of felonies. *See* A.R.S. §§ 13-604(P), 13-610(O)(3), 13-702(A), 13-3422(D)(3). It would make no sense for Arrington’s conduct to be a “dangerous nature” felony as defined by § 13-604(P) but not qualify for enhancement under § 13-604(F). Our legislature uses both descriptions of dangerous-nature offenses interchangeably, and to interpret them differently would improperly create inconsistencies. *See Farley*, 106 Ariz. at 122, 471 P.2d at 734; *see also Garcia*, 219 Ariz. 104, ¶ 15, 193 P.3d at 801 (commenting that “‘intentional or knowing’ always accompanies ‘infliction of serious physical injury’” but not use of deadly weapon or dangerous instrument).

¶17 Arrington additionally asserts that interpreting § 13-604(F) to encompass the negligent or reckless use of a dangerous instrument leads to “absurd, illogical results,” compelling us to “examine the context and purpose of the law to construe the correct purview

of the statute.” *See Bilke*, 206 Ariz. 462, ¶ 11, 80 P.3d at 271. Arrington reasons the current interpretation of § 13-604(F) leads to absurd results because a driver who negligently kills another person, as she did, is subject to a longer sentence than a defendant whose actions also unintentionally result in death or serious injury but without the use of a dangerous instrument. She also reasons it is “unjust” for a defendant who “recklessly exhibits a weapon” during an aggravated assault to be subject to § 13-604(F) while a defendant who recklessly causes a serious physical injury would not.

¶18 We find nothing absurd in these results. “An absurd result is one ‘so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.’” *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 12, 159 P.3d 547, 550 (App. 2006), *quoting State v. Estrada*, 201 Ariz. 247, ¶ 17, 34 P.3d 356, 360 (2001). Our legislature has simply made a policy decision to punish more severely crimes in which a dangerous instrument is used than crimes not involving a dangerous instrument—even if both, or neither, of the crimes results in serious injury or death. *See Tamplin*, 146 Ariz. at 380, 706 P.2d at 392 (“The legislature has determined that one who uses a dangerous instrument is more culpable than one who causes injury without intention or knowledge.”). Even were we to disagree with that policy choice, we cannot fairly say that it is irrational. *See Evans Withycombe, Inc.*, 215 Ariz. 237, ¶ 12, 159 P.3d at 550. Thus, to the extent Arrington asks us to look beyond the unambiguous language of § 13-604(F) to reach a different interpretation of it than the one currently

established by our jurisprudence, we conclude it is improper for us to do so. *See Bilke*, 206 Ariz. 462, ¶ 11, 80 P.3d at 271.

¶19 Arrington asserts we should not apply § 13-604(F) to a negligent homicide because the use of a dangerous instrument does not “increase[] the seriousness of the negligent homicide . . . because the most serious aspect of the negligent homicide is not the driving, but the death.” Arrington relies on our supreme court’s statement in *Orduno* that § 13-604(F) is intended “to enhance sentencing when the use of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury *increases* the seriousness and dangerousness of the underlying crime.” *Orduno*, 159 Ariz. at 566, 769 P.2d at 1012. Arrington takes this statement out of context. In *Orduno*, our supreme court held that § 13-604(F) does not apply to a DUI conviction because “[e]very DUI case involves the operation of a dangerous instrument”—a motor vehicle—and, therefore, “there is no such thing as a ‘non-dangerous DUI.’” 159 Ariz. at 566, 769 P.2d at 1012. Negligent homicide, in contrast, does not necessarily require the use of a dangerous instrument. Read as Arrington suggests, our supreme court’s statement in *Orduno* would preclude enhancing a sentence for the use of a dangerous instrument in all homicides—because homicides are obviously and inherently dangerous. That interpretation of *Orduno* is wholly unreasonable. Moreover, the supreme court specifically limited its holding in *Orduno* to “the proper interplay between the ‘dangerous instrument’ language of A.R.S. § 13-604 as applied to a motor vehicle in a DUI case.” *Id.* at 566, 769 P.2d at 1012;

see also State v. Paxson, 203 Ariz. 38, ¶¶ 21-22, 49 P.3d 310, 314-15 (App. 2002) (declining to apply *Orduno* to manslaughter involving motor vehicle); *Garcia*, 165 Ariz. at 552, 799 P.2d at 893 (declining to apply *Orduno* to aggravated assault involving motor vehicle).

¶20 Arrington also contends that, read together, the word “use” in § 13-604(F) and the definition of dangerous instrument in § 13-105(11) require a showing of intent because “one cannot ‘use’ an object without intentionally employing it for a particular purpose.” She primarily relies on *United States v. Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994), in which the appellate court found an upward sentencing adjustment under the federal sentencing guidelines for the use of a dangerous instrument during a crime is only warranted when the instrument is used “with the intent to injure [the] victim.”

¶21 In *Dayea*, the defendant pled guilty to aggravated assault and involuntary manslaughter arising from a motor vehicle accident he had caused while intoxicated. 32 F.3d at 1378-79. The trial court increased the sentence for aggravated assault based on Dayea’s having “used a dangerous weapon, his truck.” *Id.* at 1379 n.1. Relying on a legal dictionary’s definition of “[to] use” as “to carry out a purpose or action by means of,” the Ninth Circuit Court of Appeals reasoned that “‘use’ of an object implies that the actor has an intent to achieve a particular purpose when he employs the object.” *Id.* at 1380, *quoting* Black’s Law Dictionary 1541 (6th ed. 1990). Thus, the court concluded, an increased sentence is only warranted when the dangerous instrument was used for the “purpose of injuring or threatening to injure.” *Id.*

¶22 But the Ninth Circuit’s reasoning in *Dayea* is flawed. In relying on the dictionary definition of the verb “use,” the court focused on the word “purpose” but ignored the phrase “action by means of.”² Even assuming the word “purpose” implies an intentional act, the term “action” carries no similar connotation. Actions can be intentional, knowing, reckless, or negligent. See A.R.S. § 13-105(1), (5), and (9). Clearly the “action” here—Arrington’s negligently killing the victim—was accomplished by the means of her vehicle irrespective of her mental state. Moreover, this court has previously rejected a similar argument. See *Tamplin*, 146 Ariz. at 380, 706 P.2d at 392 (“use” carries no “concept of intentionality”); see also *State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007) (decisions by Ninth Circuit Court of Appeals are “not controlling on Arizona courts”).

¶23 Although Arrington asks us to depart from the “grammatical or formalist approach” employed in our prior case law interpreting § 13-604(F), she has not demonstrated any compelling reason for us to do so. A jury may properly find, pursuant to § 13-604(F), that a negligent homicide committed by using a motor vehicle constitutes a dangerous offense.

²The most recent edition of Black’s Law Dictionary does not contain a definition of “use” as a verb. See Black’s Law Dictionary 1577 (8th ed. 2004) (defining the noun “use” as “[t]he application or employment of something”). Regardless, nothing in this definition suggests use must be intentional.

Consecutive sentences

¶24 Arrington contends the trial court, in ordering over her objection that she serve her sentences for the aggravated DUI convictions consecutively to her sentence for homicide, “violated A.R.S. § 13-116 and [her] constitutional rights against being put twice in jeopardy.” We first note that Arrington’s argument in her opening brief seems to conflate the double jeopardy clause of the Arizona and United States constitutions with A.R.S. § 13-116, the statutory prohibition against double punishment. Although she argues, in passing, that her sentences violated her constitutional rights against double jeopardy, the substance of her argument on appeal concerns only the application of § 13-116. Because Arrington does not properly develop a constitutional argument, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

¶25 Whether Arrington’s consecutive sentences violate § 13-116 is a question of law that we review de novo. *See State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). Section 13-116 provides: “An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent.” A trial court, therefore, cannot impose consecutive sentences “when the defendant’s conduct is a ‘single act.’” *State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006), *quoting State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). The test to determine whether conduct constitutes a single act for purposes of § 13-116 is as follows:

First, we must decide which of the two crimes is the “ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges.” Then, we “subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge.” If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether “it was factually impossible to commit the ultimate crime without also committing the secondary crime.” Finally, we consider whether the defendant’s conduct in committing the lesser crime “caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime.”

Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179, *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (citations omitted; alteration in *Urquidez*).

¶26 Arrington first contends her consecutive sentences violate § 13-116 because, under the first *Gordon* factor, “if the facts presented to support negligent [homicide] are eliminated, there are no facts left to convict on the DUI’s.” A person commits negligent homicide if she causes another’s death due to her “fail[ure] to perceive a substantial and unjustifiable risk” that her conduct could result in someone’s death. A.R.S. § 13-105(9)(d); *see* A.R.S. § 13-1102(A). Arrington’s first DUI conviction required proof that, while driving or in actual physical control of her vehicle, she was under the influence of alcohol, was impaired to the slightest degree, and had a suspended driver’s license. *See* A.R.S. §§ 28-1381(A)(1), 28-1383(A)(1). The second required proof that Arrington’s license had been suspended and, within two hours of driving or being in actual physical control of her

vehicle, she had an alcohol concentration of .08 or more. *See* §§ 28-1381(A)(2), 28-1383(A)(1).

¶27 Arrington and the state agree that negligent homicide was the ultimate charge. To convict Arrington of that charge, the state needed to prove that she had been negligent in driving her vehicle and striking and killing E. *See* § 13-1102(A). Her criminal negligence was supported by two theories of the evidence: (1) Arrington was intoxicated while driving and (2) she took her eyes off the road to apply hand sanitizer while driving. *See* § 13-105(9)(d). Because the fact of Arrington’s intoxication was unnecessary to convict her of negligent homicide, we need not eliminate it when determining whether sufficient facts remained to support her DUI convictions. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶28 The remaining facts supporting Arrington’s DUI convictions were that she had consumed several alcoholic beverages before taking control of her vehicle, had an alcohol concentration of .164 within two hours of doing so, and showed signs of impairment during field sobriety tests after the accident. *See* § 28-1381(A)(1) and (2). Arrington nonetheless argues that, “[w]ithout the fact of driving, there are insufficient facts left to convict [her] on both aggravated driving charges.”

¶29 As the state correctly notes, Arrington’s DUI convictions required proof that she “dr[o]ve or [was] in actual physical control of a vehicle.” § 28-1381(A). A person is in actual physical control of a vehicle “when the circumstances of such control . . . demonstrate an ultimate purpose of placing the vehicle in motion.” *State v. Zaragoza*, 535 Ariz. Adv.

Rep. 14, ¶ 14 (Ct. App. Jul. 23, 2008). Arrington was in actual physical control of her vehicle in violation of § 28-1381(A)(1) and (2) once she entered her truck with the intent to drive it. *See id*; *see also State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629 (1995) (defendant in actual physical control when imminent purpose to drive vehicle). Subtracting the evidence necessary to support Arrington’s negligent homicide conviction leaves sufficient facts remaining to support her convictions on the aggravated DUI charges. *Cf. State v. Cruz*, 127 Ariz. 33, 36, 617 P.2d 1149, 1152 (1980) (consecutive sentences permissible for possession of deadly weapon by prisoner and deadly assault by prisoner where possession completed before assault committed); *State v. Devine*, 150 Ariz. 507, 508, 724 P.2d 593, 594 (App. 1986) (consecutive sentences permissible when “each felonious act, although occurring on the same occasion, was committed independent of the others and was completed prior to the beginning of the next act”).

¶30 Arrington next asserts consecutive sentences were improper because “it was factually impossible to commit the ultimate crime without also committing the less serious crimes.” She reasons that her negligence was in “fail[ing] to perceive that the act of driving while being impaired by alcohol created the risk that she would strike and kill” someone and, therefore, she could not have been negligent without having committed DUI. As we have explained, however, her negligence could have been supported solely by her admission that she ceased watching the road in order to apply hand sanitizer while driving. Based on that

theory of the evidence, it was factually possible for Arrington to have negligently killed E. without also having committed DUI. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶31 Last, Arrington contends her “conduct in committing [DUI] did not cause the victim to suffer additional harm.” But, if analysis of *Gordon*’s first two factors indicates the defendant committed separate acts, we need not consider the third factor. *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993). We conclude Arrington’s conduct did not constitute a single act and thus her consecutive sentences did not violate § 13-116. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

Mitigating and aggravating factors

¶32 Arrington next contends the trial court abused its discretion in imposing an aggravated sentence for her negligent homicide conviction. We will not disturb a sentence within statutory limits, as Arrington’s is, unless it clearly appears the court abused its discretion. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003); *see also* §§ 13-604(F), 13-1102(A). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed adequately to investigate the facts relevant to sentencing. *Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357. Provided the court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight the court assigns to any factor asserted in mitigation or aggravation rests within its sound discretion. *See id.*

¶33 Arrington first asserts the trial court failed to “weigh[] or even consider[]” the evidence she had presented in mitigation. Arrington submitted numerous letters from friends and family vouching for her good character. She also presented evidence that she had a history of abuse, had participated in counseling after the accident, had given up alcohol, had “rendered aid to [E.] and cooperated fully with the authorities,” and was remorseful. As Arrington admits, the court stated at the sentencing hearing that it had “read the presentence report[,] . . . read a Pretrial Services report about [her] performance on Pretrial release[,] . . . read a sentencing memorandum filed by [her] and the attachments to it.” The court also listened to Arrington express her remorse at the sentencing hearing. We presume trial courts consider all evidence a defendant presents in mitigation, *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995), and the court’s statements here confirm that presumption. Arrington cites—and we find—nothing supporting her assertion that a trial court is not presumed to have considered the evidence relevant to mitigation unless it finds mitigating factors. Because the record reflects the court gave due consideration to the evidence, we cannot say it abused its discretion by declining to impose a lesser sentence. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.2d at 357 (“[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.”).

¶34 Nonetheless, Arrington argues the trial court “did not take into consideration that [her] actions were without malice, recklessness or the intent to hurt anyone” but, rather,

“belie[d] the jury’s verdict with its own finding” that she should have been found guilty of manslaughter. Nothing in the record suggests, however, that the court ignored the jury’s verdict; it imposed a sentence that was within the range permitted for the crime of negligent homicide, of which the jury found her guilty. *See* A.R.S. §§ 13-1102; 13-604(F); and 13-702(C), (D), and (E).

¶35 Last, Arrington argues the trial court abused its discretion in considering “irrelevant facts” in sentencing her. While Arrington was in custody, she received a telephone call from a friend during which the friend apparently remarked that Arrington should get “four for one credit” for killing “a faggot, a tree-hugger, a Frenchman and a cyclist.”³ Arrington laughed in response and stated, “I would have to agree with you.” Arrington asserts the court improperly considered “the insensitive comments of a third party” and “assumed something negative about [her] character” in aggravation. Contrary to Arrington’s suggestion, the court acknowledged that Arrington “didn’t know [the derogatory statement] was coming” and chided her only for her “reaction to it.” And, although the court listened to and discussed the recorded conversation at the sentencing hearing, the record does not indicate the court relied on Arrington’s statements during the call as an aggravating factor in sentencing her. In any event, as the state notes, a sentencing court may properly consider in aggravation the defendant’s character, including her apparent insensitivity to the victim.

³ Although neither a recording nor a transcript of the telephone call is included in the record on appeal, the trial court discussed the call both at trial and at the sentencing hearing after listening to a recording of it. The parties do not dispute the contents of that recording.

See § 13-702(C)(24) (court may consider in aggravation “[a]ny . . . factor that the state alleges is relevant to the defendant’s character”).

Disposition

¶36 For the foregoing reasons, we affirm Arrington’s convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge